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No. 80-931

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BONANNO LINEN SERVICE, INC., *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD

and

LOCAL 25, INT'L. BRO. OF TEAMSTERS, *Respondents.*

Upon Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF FOR THE GRAPHIC ARTS UNION EMPLOYERS OF AMERICA, A DIVISION OF THE PRINTING INDUSTRIES OF AMERICA, INC. AS AMICUS CURIAE

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BRIEF FOR THE GRAPHIC ARTS UNION EMPLOYERS OF AMERICA, A DIVISION OF THE PRINTING INDUSTRIES OF AMERICA, INC. AS AMICUS CURIAE

This brief on behalf of the Graphic Arts Union Employers of America, a division of Printing Industries of America, Inc., as *amicus curiae,* is filed with the written consents of the parties pursuant to this Court's Rule 36. The *amicus* supports the position of the Petitioner and urges reversal of the decision of the Court of Appeals for the First Circuit.

THE INTEREST OF THE AMICUS CURIAE

The Graphic Arts Union Employers of America, a division of the Printing Industries of America, Inc., is a national association representing approximately 3,500 graphic arts companies throughout the country. Its membership is comprised of unionized companies in the commercial printing industry, which employ almost 250,000 unionized workers. Although there are some large printing company members which employ several hundred or more employees, the industry is characterized by a vast number of small and medium sized companies staffed by from 3 or 4 employees to 25 to 50 employees. Over 80 percent of the firms in the industry employ fewer than 25 employees.

Members operating in metropolitan areas have traditionally negotiated with the various printing craft unions on a multiemployer basis. This practice continues, although in recent years an increasing number of companies have negotiated individual contracts in the face of radically changing technology and more specialized needs which differentiate them from their counterparts in the industry.

All of these companies negotiate with at least one labor organization. Since each of these unions has traditionally represented a particular printing craft, e.g., typesetters, pressmen, bindery workers, etc., it is not at all uncommon for even a small plant to bargain on a multiemployer basis with as many as three or four different unions.

The direct and immediate interest of the *amicus* herein lies in the fact that given the fiercely competitive nature of the industry and the fungible nature of the service performed, a multiemployer bargaining impasse and ensuing strike is tantamount to disintegration of multiemployer bargaining. Such bargaining ceases to be a stabilizing influence because, as customers of printers confronted with a strike or strike threat rush to non-unionized competitors to fulfill their printing needs, the continued existence of the group

members is sharply threatened. Indeed, many businesses simply do not survive the bargaining impasse and ensuing strikes, resulting in a loss of competition and the loss of employment by unionized workers.

In short, when deadlock occurs multiemployer bargaining fails of its purpose. Not only has bargaining ceased, but the union is then free to destroy the joint efforts of the multiemployer group by selectively striking only employers of its own choosing. Nevertheless, under the Board's rule, the remaining employers are not free to withdraw in order to conduct separate negotiations. The employers are thus trapped by Labor Board doctrine — in the name of multiemployer bargaining unit "stability" — in a situation of neither stability nor progress. They are prevented from pursuing individual negotiations no matter how likely the prospect that such negotiations on individual bases can bring about resolution of the dispute. Board doctrine, in short, has barred an alternative method of negotiations even though the present method has demonstrably not worked.

The problem is exacerbated when, as often happens in the printing industry, the union selects favored multiemployer unit members during a post-impasse strike and individually offers those employers "interim" agreements. These agreements, by which the union puts favored employers back in business to reap the work of other employers not so favored by the union, drives a wedge of such explosive proportions into the multiemployer unit as to disintegrate it. These interim agreements take various forms in the printing industry, but their destabilizing effect is the same. They are the antithesis of group bargaining, and their use should release the remaining employers from continued mandatory participation in multiemployer bargaining. This singling out of some employers by the union in all fairness mandates the correlative right of the other employers — endorsed by the Second, Third, Fifth, Eighth, and Ninth Cir-

cuits, but rejected by the Court below — similarly to negotiate on an individual basis.

Employers in the printing industry are, moreover, particularly vulnerable to the imbalance in the economic weapons created by the Board's approach. As the Court in *N.L.R.B.* v. *Beck Engraving Co., Inc.*,[1] pointed out, unions have both the selective strike and individual negotiations at their disposal, while the employers have only the lockout. The *Bonanno* Court cited such additional employer "weapons" as stockpiling inventories, changing contract schedules and transferring work from one plant to another. Given the short, inexorable deadlines for printing (e.g., magazines, advertisements), the printer obviously can neither stockpile nor change contract deadlines. Given the vast number of small companies with single plants, there is no place to divert the work.

To be sure, there is nothing in the Act which requires that the economic strength of the competing parties be equal. But that proposition is a far cry from licensing the Board to establish a rule, as it has in this matter, which is calculated to *create* an imbalance. The lack of even-handed treatment by the Board is, accordingly, particularly devastating and grossly unfair to employers in the printing industry.

SUMMARY OF ARGUMENT

1. Where the National Labor Relations Board has acted at odds with a statutory mandate or has frustrated the Congressional policy underlying a statute, the deference usually accorded administrative tribunals by reviewing courts no longer comes into play. *N.L.R.B.* v. *Brown*, 380 U.S. 278, 291 (1965). The latest version of the Board's rule governing the rights of the parties to multiemployer bargaining in the event of impasse falls squarely into that category. The Con-

[1] 522 F.2d 475 (3rd Cir. 1975).

gressional rationale for supporting multiemployer bargaining, as this Court recognized in *Buffalo Linen,*[2] was that such bargaining "was a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining."

The Board has perverted the statutory purpose of "promoting labor peace", i.e., resolving disputes, by its slavish devotion to a doctrine of its own invention, that of maintaining bargaining unit stability. Desirable as this latter goal may appear to be at first blush, it can be justified only if it "promotes labor peace" and results in "strengthened collective bargaining." Otherwise, the underpinning for Congressional support of multiemployer bargaining is lost.

The Board, however, has never forged that connecting link in the matter at hand, for the obvious reason that a bargaining impasse with or without selective strikes by the union involved can scarcely be viewed rationally as an indication of labor peace or as strengthened collective bargaining. What the Board has done instead is to rely on bargaining unit stability as its own justification, and by that reasoning has discarded the primary *statutory* purpose of dispute resolution. On that ground alone the Board's decision and rationale are not entitled to judicial deference.

Moreover, the Board's current position on withdrawal is further discredited by the Board's own vacillation on the matter over the years. For a quarter century — from 1950 to 1973 — it adhered to its holding in *Morand Bros. Beverage Co.*[3] that parties were free to bargain individually after an impasse had been reached in multiemployer bargaining. It seemed to digress from that pronouncement in dictum in a 1964 decision and seemed to return to it in 1971. Not until its *Hi-Way Billboards, Inc.*[4] decision in 1973 did the Board

[2] *N.L.R.B.* v. *Truck Drivers Local Union No. 449,* 353 U.S. 87, 95 (1957).

[3] 91 NLRB 409 (1950), enforced in part and remanded in part, 190 F.2d 576 (7th Cir. 1951).

[4] 206 NLRB 22 (1973).

hold that withdrawal and unilateral bargaining were *not* permitted in the event of impasse. Despite its pronouncements in *Hi-Way Billboards* and its progeny, to this day the Board has not overruled or reconciled its *Morand Bros.* ruling. In light of the Board's checkered history of decisions on the impasse issue, its pronouncement now is not entitled to judicial deference.

2. As the courts of appeals of five judicial circuits have recognized, the Board's current doctrine is misconceived. Essentially the Board has disregarded the Act's stated policies of encouraging collective bargaining and avoiding industrial strife. The vice lies in the Board's blind devotion to the standard it enunciated in *Retail Associates, Inc.*[5], a standard which upon analysis is wholly irrelevant to the issue of rights accruing at impasse. In *Retail Associates* the Board, in order "to ensure stability of such bargaining relationships," restricted withdrawal after multi-employer bargaining had commenced to those situations involving "unusual circumstances." The syllogism is impeccable: withdrawal is permitted only in unusual circumstances; impasse occurs often enough so as not to be an unusual circumstance; hence withdrawal is not permitted in the case of impasse. But whether or not impasse is an "unusual circumstance" obviously begs the question. The glaring oversight on the part of the Board is that stability in a bargaining relationship is not an end in itself, but simply a means to achieve resolution of bargaining disputes. If a particular bargaining relationship fails to achieve that resolution, there is every reason to permit alternatives that may better accomplish the statutory purpose. As the Court of Appeals for the Second Circuit recognized in *N.L.R.B.* v. *Independent Association of Steel Fabricators, Inc.*, 582 F.2d 135, 146 (1978): ". . . the objectives of collective bargaining would be ill-served by compelling employers to remain in the

[5] 120 NLRB 388 (1958).

bargaining unit once it becomes clear that no progress is being made within that framework."

3. The right of an employer to withdraw from multiemployer bargaining becomes all the more compelling in the common situation where a union after impasse strikes the unit but selectively offers "interim agreements" to employer members of its choosing. Such interim agreements come in a variety of forms, but all have the same purpose: to fragment the group so the union can deal with the remaining members after they have been reduced to a weakened state. As the court in *Beck* put it, ". . . allowing individual negotiations even on an interim basis is tantamount to a rejection of the existence of the multiemployer bargaining unit." 522 F.2d at 483.

The vice of the interim agreement is that it shatters the foundations upon which multiemployer bargaining is based. Employers band together because of their assessment that their strength is enhanced when they act collectively. Plainly if an employer did not believe that joint action would be to his benefit he would exercise at the outset his prerogative to bargain on his own. His consent to multiemployer bargaining, in short, is based on the assumption that all employers will be treated the same in a common undertaking. Since the very purpose of the interim agreement is to differentiate among the members of the multiemployer group, the use of such agreements destroys the premise upon which employer consent to multiemployer bargaining was given and hence is inherently destructive of the multiemployer unit itself.

In a similar vein, the employers' consent to multiemployer bargaining is also based on the expectation that no employer in the course of bargaining will gain a competitive advantage over his counterparts. This premise, too, is exploded by the interim agreement. Particularly where the product is fungible, as in the printing industry, permission to return to work — and to capture the work of competitors

who are still on strike — gives the employer favored by an interim agreement an enormous competitive advantage. Plainly the integrity of the multiemployer unit, and the basis of the employers' initial consent to multiemployer bargaining, are substantially eroded by the union's solicitation of such agreements.

At bottom, the Board's rule violates its professed doctrine that unions and employers should have equal rights of withdrawal. Incredibly, the Board rationalizes its decision largely on the ground that the union — despite a selective strike and/or solicitation of interim agreements — has not withdrawn from multiemployer bargaining but in fact has facilitated such bargaining by taking action to break the impasse and resume group bargaining. The Board seems blind to the fact that any such breaking of the impasse is accomplished only by carving out some members of the group at the expense of those who remain, so that the portion of the group that remains is severely weakened.

The fact that all may eventually be bound by the same contract is irrelevant. The salient point is that any such agreement is reached only because the union has insisted on dealing in piecemeal fashion with the employers comprising the multiemployer group. Unless the Board is to scrap any notion of even-handed treatment, fairness dictates that since the union in such circumstances has engaged in individual bargaining, all of the employers should be released from any mandatory commitment to multiemployer bargaining.

ARGUMENT

1. The Position Of The National Labor Relations Board Is Not Entitled To Judicial Deference

As this Court has repeatedly made clear, "The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia * * *." *American Ship Building Co.* v. *N.L.R.B.*, 380 U.S. 300, 318 (1965). The Courts "are not obliged to stand aside and rubber-stamp their affirm-

ance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *N.L.R.B.* v. *Brown*, 380 U.S. 278, 291 (1965). See also, *Volkswagenwerk Aktien* v. *Federal Maritime Commission*, 390 U.S. 261, 272 (1968).

We are well aware of this Court's assertion in *Buffalo Linen*[6] that Congress entrusted "primarily" to the Board the responsibility of resolving conflicting legitimate interests in multiemployer bargaining cases, "subject to limited judicial review" (footnote omitted). The Board, accordingly, can be expected to contend that its view of the legal consequences of impasse in a multiemployer bargaining context is entitled to deference by the Court. Such a contention is wrong. The Board's view rejecting impasse as a ground for withdrawal from multiemployer bargaining — a view which has been rejected by the Second, Third, Fifth, Eighth and Ninth Circuits[7] — is not entitled to deference because it flouts the stated intent of Congress and has been the subject of repeated reversals of Board position.

Where the Board has erred is in giving preeminence to a Board-invented policy of maintaining bargaining unit stability, at the price of subordinating the primary *statutory* purpose of dispute resolution. The Board has blindly pursued this goal of bargaining unit stability even though in the event of impasse the multiemployer unit's usefulness as a vehicle of dispute resolution has collapsed. By adopting a standard which fails to effectuate and indeed contravenes a

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[6] *N.L.R.B.* v. *Truck Drivers Local Union No. 449, (Buffalo Linen Supply Co.)*, 353 U.S. 87, 96-97 (1957).

[7] *N.L.R.B.* v. *Independent Association of Steel Fabricators, Inc.*, 582 F.2d 135 (2nd Cir. 1978); *N.L.R.B.* v. *Beck Engraving Co., Inc.*, 522 F.2d 475 (3rd Cir. 1975); *N.L.R.B.* v. *Hi-Way Billboards, Inc.*, 500 F.2d 181 (5th Cir. 1974); *Fairmont Foods Co.* v. *N.L.R.B.*, 471 F.2d 1170 (8th Cir. 1972); *N.L.R.B.* v. *Associated Shower Door Co.*, 512 F.2d 230 (9th Cir. 1975); *H & D Inc.* v. *N.L.R.B.*, _____ F.2d _____, 105 LRRM 3070 (9th Cir. 1980).

plain purpose of the Act, the Board has violated the principles underlying the deference doctrine and, therefore, forfeits any right to rely on it before a reviewing Court.

In addition to subverting an overriding Congressional objective, the Board's current administrative construction is not entitled to judicial deference because of the contradictory positions the Board has taken on this matter over the years. Compare *Espinoza* v. *Farah Manufacturing Co.*, 414 U.S. 86, 94 (1973); *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 141-146 (1976).

The checkered history which the Board brings to the Court begins with its decision in *Morand Bros. Beverage Co.*, 91 NLRB 409 (1950), enforced in part and remanded in part, 190 F.2d 576 (7th Cir. 1951). In *Morand*, 91 NLRB at 417, the Board squarely ruled that the parties were "free to bargain [individually] after an impasse had been reached in association-wide bargaining." The Board adhered to this position for well over a decade.

While its *Morand* doctrine was still in effect, the Board issued its decision in *Retail Associates, Inc.*, 120 NLRB 388, 394 (1958), declaring that stability in the multiemployer bargaining relationship was desired and that once multiemployer bargaining commenced, unilateral withdrawal by either any party was not permitted absent "unusual circumstances." The Board in *Retail Associates* did not question its *Morand* decision nor did it address whether impasse was within the category of excusable "unusual circumstances." In 1964, again without questioning *Morand*, the Board suggested in *Ice Cream Council Inc.*, 145 NLRB 865, 870 (1964) (*dictum*) that impasse would not privilege unilateral withdrawal from multiemployer bargaining, only to imply later in *P.H.C. Mechanical Contractors,* 191 NLRB 592, n. 1 (1971), that it would.

Indeed, even in its 1973 pronouncement in *Hi-Way Billboards, Inc.*, 206 NLRB 22, when it held for the the first time that impasse did not privilege unilateral withdrawal

from the multiemployer bargaining unit, the Board did not question, nor for that matter even take cognizance of, its prior landmark decision in *Morand*. It was not until the Board unsuccessfully sought enforcement of its *Hi-Way Billboards* decision in the Court of Appeals that its appellate counsel, in an impermissible[8] *post hoc* rationalization, argued that *Morand* implicitly was overruled by *Retail Associates*. Indeed, to this date the Board has not overruled or reconciled its *Morand* decision which is, of course, inescapably at odds with its decision in the case at bar. Given this history, it is respectfully submitted that there simply is no basis for judicial deference to the Board's position on this issue.

II. The Board Has Improperly Subordinated The Congressional Policies In Favor Of Collective Bargaining And Avoidance Of Industrial Strife In Favor Of Its Own Goal Of Stability In Multiemployer Bargaining

The Board's position that even a state of impasse does not permit withdrawal from multiemployer bargaining has worked a severe dislocation in the Act's stated policies of encouraging collective bargaining and avoiding industrial strife. For it has subordinated these express statutory policies in favor of imposing its own goal of "stability" in multiemployer relationships. This announced objective not only improperly subordinates the Act's stated policies; it is inconsistent with them as well.

The foundation upon which the Board's approach below rests is its *Retail Associates* decision. In *Retail Associates* the Board concluded that "the stability requirement of the Act . . ." compels restricting the right of unilateral withdrawal from multiemployer bargaining to those cases involving "unusual circumstances." 120 NLRB at 393, 395. Then, in a bootstrap argument of the worst order, the Board cranked impasse into the "unusual cir-

[8] *N.L.R.B.* v. *Metropolitan Life Ins. Co.*, 380 U.S. 438, 444 (1965).

cumstance" rationale. A bargaining impasse was said to be a common occurrence. Hence, the logic runs, because impasse is not "unusual", it can provide no basis for withdrawal from multi-employer bargaining.

This circular reasoning defies both logic and reality, for regardless of whether or not a bargaining impasse is an unusual event, to formulate the issue in those terms is of no value in assessing whether the bargaining deadlock amounts to failure of the multiemployer vehicle as a means of achieving a bargained resolution of disputes. Moreover, it does nothing to achieve the correlative statutory purpose of avoiding industrial strife.

Further, the very underpinning of *Retail Associates* is fallacious. For, there is no "stability requirement of the Act"[9] that justifies locking employers into a multiemployer framework of dispute resolution where, as here, a contract has expired and the bargaining deadlock has frustrated the bargaining process.

This "stability requirement of the Act," asserted by the Board in *Retail Associates* is a fiction, the source of which it has never explained. To be sure, the Board and courts historically have recognized that bargaining relationships should be insulated from challenge in certain situations prior to contract expiration. For example, where a union is newly certified, the employer cannot challenge majority status for a one-year period as an excuse for not continuing negotiations. *Ray Brooks* v. *N.L.R.B.*, 348 U.S. 96 (1954). Similarly, during the critical two-month period before the expiration of a contract, the Board will dismiss an election petition filed by a rival union[10] or a decertification petition filed by employees, or an employer petition.[11]

However, in order to effectuate statutory objectives, the Board routinely permits destabilization of ongoing

[9] *Id.*, 120 NLRB at 393.

[10] *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1000 (1958).

[11] *Nelson Name Plate Co.*, 121 NLRB 1027, 1028 (1958).

negotiations *after* a contract has expired. Thus, for instance, after a contract has expired the Board *forbids* continued negotiations if a rival union files a representation petition covering the unit.[12] Similarly if employees file a decertification petition, the Board *requires* an employer to cease negotiations.[13] Likewise, it will permit unilateral suspension of negotiations if the employer objectively believes that the union has lost its majority status.[14] In short, the Board commonly will destabilize ongoing bargaining relationships after a contract has expired in order to accommodate statutory purposes which are superior to "stability" in bargaining relationships.

In contrast, what we are seeking is an alternative method of bargaining, not its curtailment. In the event of impasse, the option of bargaining on either an individual basis or a multiemployer basis is far less intrusive to the bargaining process than the procedures the Board itself has traditionally allowed in the examples discussed above. The Board has expressly recognized as much in its landmark *Morand* decision, yet has inexplicably continued to ignore its pronouncement there despite the repeated invitations of the courts of appeals[15] to come to grips with it. Thus, as the Board explained in *Morand, supra*, 91 NLRB at 416, 418-419 (the Board's emphasis):

* * *

> Finally, the Respondents contend for a construction of Section 8(b)(1)(B) which would preclude a union from seeking to enter into separate negotiations, in lieu of joint negotiations, *even after joint negotiations have collapsed*. Such a view is inconsistent with the basic

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[12] *Shea Chemical Corp.* 121 NLRB 1027, 1028 (1958).

[13] *Telautograph Co.*, 199 NLRB 892 (1972).

[14] *United States Gypsum Co.*, 143 NLRB 1122 (1963).

[15] *N.L.R.B.* v. *Hi-Way Billboards Inc., supra*, 500 F.2d at 184; *N.L.R.B.* v. *Beck Engraving Co., supra*, 522 F.2d at 483; *N.L.R.B.* v. *Fairmont Foods Co., supra*, 471 F.2d at 1172.

policy of the Act to encourage the practice and procedure of collective bargaining, as it would prevent the parties to a labor dispute from exhausting the possibilities of settling their dispute by *collective bargaining rather than economic attrition*. We do not believe, and are not prepared to hold, that Congress intended Section 8(b)(1)(B) to curtail collective bargaining in this fashion.

* * *

Balancing the instability resulting from the collapse of negotiations on a multiemployer basis against the benefits to be derived from further collective bargaining on a single-employer basis, we conclude that, in this case, to ensure the fullest freedom in exercising the collective bargaining rights guaranteed to employees single-employer units could be found appropriate (footnote omitted).

* * *

Here, however, there was no attempt by the Local to substitute unilateral action or individual bargaining for collective bargaining, but only to substitute for one type of collective bargaining (association-wide) another type of collective bargaining (on a single-employer basis). Thus, the Local's conduct, far from being in derogation of the statutory policy may well have served to effectuate that policy.

* * *

There is no basis for prohibiting an alteration in bargaining from a multiemployer to an individual basis after a contract expires and impasse occurs. Certainly the Act itself expresses no preference for multiemployer bargaining over individual bargaining. The only preferences of the Act are to encourage collective bargaining and thereby avoid industrial strife. Those goals are achieved through individual bargaining no less than through multiemployer bargaining.

Yet the Board has locked employers into continued multiemployer bargaining which has failed and thereby in-

vited resort to economic force while prohibiting peaceful resolution of the dispute through individual negotiations. Contrary to its statutory mandate, the Board has irrationally sacrificed bargaining and encouraged industrial strife in order to achieve its own inflexible objective of stability in multiemployer bargaining relationships. In so doing, the Board improperly has displaced the goals of Congress with its own.

III. A Union's Interim Agreements With Multiemployer Bargaining Unit Members Mandate The Right Of Other Employer Members To Withdraw From The Multiemployer Bargaining Unit And Also Bargain Individually

A union's unilateral decision to enter into separate "interim" agreements with only certain members of a multiemployer bargaining unit is so antithetical to multiemployer bargaining that such action must, as a matter of sound national labor policy, authorize a similar unilateral right on the part of the remaining employers to withdraw and negotiate separately.

The printing industry is not unfamiliar with these "interim agreements" and their destructive impact on multiemployer bargaining.[16] Such agreements take many forms. Some, such as the version used by a Michigan printing union (attached hereto as Supplemental Appendix pp. SA 1—SA 4) provide for acceptance of the union's last offer, subject to later revision in light of the ultimate agreement reached by the union with the remaining weakened bargaining unit members. Others, such as the version used by a Washington, D.C. printing local (attached hereto pp. SA 4—SA 6), are actually separate agreements subject to revision to incorporate any provisions in the subsequent multiemployer agreement which are more favorable to the

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[16] Indeed, they are generally referred to in the industry as "white papers" — so called because they signify surrender to a union's whipsawing tactics.

signatory employer, but not those which are more onerous. Other varieties continue the expired contract pending the signatory employer's agreement to subscribe to the ultimately negotiated multiemployer agreement.[17]

Irrespective of their variety, these interim agreements all serve the same purpose. By permitting employers of their choosing to return to work (and thus be able to solicit the customers of those employers still on strike), the unions are fragmenting the multiemployer group so as to deal only with those who are left in a weakened state. The union's solicitation of such agreements is totally inconsistent with multiemployer bargaining and destructive of the premises upon which such bargaining was entered. Accordingly, the union's use of interim agreements with respect to some employers must permit those other unit members who desire withdrawal to escape from multiemployer bargaining. This conclusion is compelled by several reasons, discussed below.

First, entry into multiemployer bargaining is, from the beginning, consensual. As a practical matter, employers arrive at their decision to enter—or not enter—multiemployer bargaining by making an assessment of the strength they can anticipate by joining collectively with other employers. Obviously if an employer was not satisfied with the perceived collective strength achieved by being bound with certain other employers in this common undertaking, it would not consent to join in the first place and would undisputedly be free to negotiate its own agreement. In short, then, consent to join multiemployer bargaining rests upon reliance that all will be treated the same in a common undertaking.

Interim agreements fundamentally destroy that premise, by permitting the union unilaterally to change the basis upon which that consent was given. By so undermining the foundation upon which multiemployer bargaining was entered, the use of interim agreements works a revocation of

[17] Compare *PHC Mechanical Contractors*, 191 NLRB 592 (1971), and *Sangamo Construction Co.*, 188 NLRB 159 (1971).

that consent so as to enable the other employers to revert to individual bargaining.

The Board itself implicitly has recognized as much. Thus, in *Pacific Coast Association*, 163 NLRB 892 (1967), as interpreted in *Hi-Way Billboards, Inc.*, 191 NLRB 244, 245 (1971), the Board ruled that a union's partial withdrawal from multiemployer bargaining *before* the commencement of bargaining did not unfairly whipsaw the remaining members because they, at that time, also were allowed to withdraw unilaterally. The same line of reasoning attaches to a change in the premise upon which employer consent was given where the union unilaterally effects a change in the composition of the bargaining unit *after* bargaining starts. The employer should accordingly be free to negotiate individually because the union's action pervasively changes the predicate upon which the employer's consent initially was given.

Second, a union's unilateral use of interim agreements destroys another foundation on which employer acquiescence in multiemployer bargaining rests. One of the reasons why employers enter multiemployer bargaining is to avoid being placed at a competitive disadvantage by any other employer. Yet the interim agreement explodes that very foundation, for it allows the union at its option to select a favored employer and put it back to work. The favored employer obtains an enormous competitive advantage—in terms of an overflow of business—which the unblessed employer, who is not offered the interim agreement, cannot acquire. The problem is particularly serious in the printing industry because, due to the fungible nature of the product, the unfavored employer has no choice but to watch his work be channelled, perhaps permanently, to the favored employer operating under the interim agreement. The surge of work which suddenly flows to the holder of an interim agreement gives him a lasting competitive edge, even if all employers ultimately sign a contract with uniform terms.

The Board has never grasped that compelling reality.

Third, the Board's sanction of interim agreements is at odds with its own professed doctrine that unions and employers should have equal rights of withdrawal from multiemployer bargaining. *Evening News Assn.*, 154 NLRB 1494 (1965), *enf'd. sub nom., Detroit Newspaper Publishers Ass'n.* v. *N.L.R.B.*, 372 F.2d 569 (6th Cir. 1967). Allowing the union the unilateral right to select a multiemployer unit member for separate negotiations—whether "interim" or otherwise—while depriving other unit members of the same right to opt for individual negotiations, is fundamentally inconsistent with the *Evening News* doctrine to which the Board claims adherence.

The arguments advanced by the Board in favor of allowing use of interim agreements with some unit members, but without any correlative withdrawal rights accruing to other unit members, do not withstand scrutiny. The Board argued below that interim agreements—or at least the two varieties it considered in *Sangamo* and *PHC, supra*—are not antithetical to group bargaining because (1) they are said to facilitate breaking an impasse and resumption of unit-wide bargaining; and (2) all employers assertedly have a stake in the final outcome of the multiemployer bargaining. *Bonanno, supra,* 243 NLRB 140 (1979). The first point rests upon "means are justified by the ends" reasoning which is inconsistent with the policies of the Act; the second point is simply specious.

To the extent that interim agreements facilitate the breaking of an impasse and the resumption of multiemployer bargaining, they accomplish this goal only by fracturing the cohesiveness and destroying the strength of the multiemployer group. This is obviously the case because the entire thrust of a union's solicitation of interim agreements is to carve out certain employers and use them as bargaining leverage against their counterparts. Not only is the group substantially weakened by the removal of certain employers,

but at the same time inexorable pressure is created upon the remaining weakened members to settle at any cost to recapture the work suddenly flowing to the interim agreement holders. Not having the right to insist similarly on an individual agreement, the remaining employers find themselves locked into a fractured bargaining structure to which they never consented at the outset of bargaining. The Board's notion that interim agreements facilitate the breaking of an impasse, if true at all, is true only because the Board has sanctioned a device which traps a portion of the original group into continued group bargaining with no means of escape. In effect, they are locked into multiemployer bargaining, but in a different unit from that which they originally agreed to join. The Board has vested a right in the union, enabling it to bargain on an individual basis, while inequitably denying the same right to employers.

Finally, the Board's assertion that interim agreements are consistent with group bargaining because the interim agreement holder has a stake in the final multiemployer agreement, is not credible. To the contrary, the signing of an interim agreement is a disclaimer of any such stake because the employer has removed himself from the negotiating process. The inflow of new business, which cannot be performed by other struck members, may well be so great that the increased cost of labor becomes inconsequential to the interim agreement holder. In any event, he remains secure in the knowledge that the other employer members who are denied access to such individual negotiations, will not gain any competitive advantage over him when, in their weakened states, they finally acquiesce in a new contract. This is particularly true in the case of the employer who signs an agreement such as the one appearing on pp. SA 4-6, which gives him the benefit of more favorable terms in the multiemployer agreement, but relieves him of any more onerous terms. Thus, as a practical matter, the "stake" that the in-

terim agreement holder has in the final contract is basically a no-risk proposition.

Irrespective of his "stake" however, he is no longer *participating* in group bargaining. He has effectively been removed from the group through unilateral union action, in stark contrast to the other employers who, in a substantially weakened state and at a competitive disadvantage, have no choice but to remain locked into group bargaining.

CONCLUSION

For the foregoing reasons this Court should reverse the decision of the lower court with instructions that the occurrence of either impasse or use of interim agreements in the course of multiemployer bargaining privileges members of the multiemployer unit to withdraw and bargin with the union on an individual basis.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

June 7, 1974

Mr. Douglas M. King
King Smith Company
818 W. Hancock
Detroit, Mi. 48201

Dear Mr. King:

Collective Bargaining Negotiations between the Graphic Arts Association of Michigan and GAIU 9L Detroit have failed to resolve the outstanding issues in dispute. The Union has no alternative but to acknowledge a complete breakdown of discussions and a total impasse in negotiations.

Under the circumstances the Union intends to engage in all necessary action required to protect the interests and rights of the members.

In view of the obvious impasse in negotiations the Union proposes to each individual Employer — who prefers to continue uninterrupted production in his plant and maintain peaceful labor management relations — that the Employer inform the Union immediately of his intent to agree to the terms and conditions outlined in the Union's proposal of June 6, 1974 (copy attached).

That settlement proposal will be available until Noon on Monday, June 10, 1974. At that time the Union proposal will be withdrawn and the Union will require a settlement containing more equitable terms and conditions.

Sincerely,

/s/ JOHN W. CARLSON
John W. Carlson
President
GAIU, Local 9L

JWC/sm
opelu42
afl-cio

cc: Shop Delegate

June 6, 1974

UNION PROPOSAL

DURATION:	2 years.
WAGES (RETROACTIVE)	.28 (CO/L)
	Plus
FIRST YEAR:	June 1, 1974 — 4 1/2% wage adjustment and continued Cost-of-Living — 4¢ per point paid August 1, 1974 and quarterly thereafter (Locked in May 31, 1976).
SECOND YEAR:	$10.00 across the board
FIRST YEAR:	Inequity raise for 38" Web.
	1st Pressman — 28¢
	2nd Pressman — 25¢
FIRST YEAR:	Apprentice starting $4.00 per hour.
ARTICLE 16:	Layoff Pay and Division of Work
	Back to old contract
HOLIDAY:	2nd year: Day after Thanksgiving

HEALTH AND WELFARE:

Maintenance of benefits. Additional benefits to be purchased from the $5.85 excess as follows:

1) Hospital confinement for mental or nervous or tuberculosis from 45 days to 120 days.
2) Increase weekly indemnity maximums and a 26 weeks @ $130.00 per week.
3) Increase Major Medical maximum to $10,000 and provide $500.00 out of pocket feature in calendar year.
4) Supplement for retirees and spouse 65 and over in conjunction with Part B of Medicare.

Section 8a.

Inexperienced employees, new to the industry, will be eligible for, Health and Welfare benefits after (30) thirty days and will be eligible for the unemployment benefits after (6) six months of employment.

BEREAVEMENT PAY:

First Year:

Include all tentative language agreements — back to old contract where no change has occurred.

It is understood and agreed that should the Union negotiate an Agreement with Employers employing a majority of the members of GAIU 9L Detroit (affected by this Contract) then that Agreement *will constitute the City Agreement* and this understanding *will be modified to coincide* with either the *lesser or greater terms* and conditions of the City Agreement as established.

For the Employer: For the Union:

_____ _____

* * *

[WASHINGTON D.C. AGREEMENT]

This agreement between Columbia Typographical Union and _____ shall become effective on _____ and shall remain in effect until February 10, 1980, or until both parties to the agreement voluntarily agree to modify its terms. The parties further agree that the terms and conditions of the Master Contract between Columbia Typographical Union and the Union Employers Division of the Printing Industry of Washington, exclusive of the provisions expressed in this Agreement, which were in effect from February 11, 1975, to February 10, 1977, shall govern the relations of the parties to this agreement.

Health & Welfare Contributions:

Effective	2/11/77	68¢ per hour
"	2/11/78	78¢ per hour
"	2/11/79	88¢ per hour

Pension Contributions:

Effective	2/11/77	32¢ per hour
"	2/11/78	36¢ per hour
"	2/11/79	40¢ per hour

Vacation:

Four (4) weeks vacation after ten (10) years of service.

Sick Leave:

Subject to the provisions of the Master Agreement, all employees with one or more years of continuous employment with the employer on the following dates shall be credited with days of sick leave as stated below:

2/11/77	3 days
2/11/78	3 days
8/11/79	4 days

Wages:

Effective	2/11/77	$318.50 per week
"	2/11/78	337.40 per week
"	2/11/79	347.55 per week
"	8/11/79	C-O-L Below

Effective the first pay day on or after August 11, 1979, the wage rate of each Journeyman and Apprentice shall be increased in accordance with the rise in the Consumer Price Index (1967 = 100), issued by the United States Bureau of Labor Statistics, but at no time will the rates fall below the wage scale appended to this Agreement. The cost-of-living adjustment will be calculated as follows:

For each one (1) full point by which the August, 1979, Index exceeds the February, 1979, Index level, there will be a four (4) cents per hour increase in the wage rate.

Any payment required under this Cost-of-Living section shall be due and payable as soon as practicable or, if unlawful as of August, 1979, if and when permitted by regulations issued by the relevant government agency.

No adjustments, retroactive or otherwise, shall be made due to any correction which may later be made in the published figures for the Index.

In the event that the Bureau of Labor Statistics shall fail to publish the Index, or shall change its base period, the parties shall meet to discuss and apply any such new Index and its application to the Cost-of-Living adjustment. If the parties are unable to agree, the matter shall be referred to arbitration.

In the event that the contract eventually agreed upon between the Columbia Typographical Union and the Union and Employers Division of the Printing Industry of Washington provides for wages, pension and health and welfare contributions, vacation, and sick leave less favorable to the printers covered by this Agreement, the Columbia Typographical Union will make appropriate adjustments in the terms of this Agreement. Such adjustment shall be prospective only and shall not require a repayment of any amounts by or on behalf of any employee.